time acted in contravention of any instruction from the appellant. It is therefore our view that the appellant's allegation as contained in para 16 of the amended defence and counterclaim had not at all been substantiated.

Accordingly, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Paul Ong & Associates; Adnan, Sundra & Low; Albar Zulkifly & Yap.*

Reported by *Prof Ahmad Ibrahim*

Co-operative Central Bank Ltd v Sri Devi

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 100 OF 1988
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND AJAIB SINGH SCJJ
30 DECEMBER 1989

Land Law — Charge — Chargor a co-operative society — Charge executed to secure loan given by society to husband of chargee — Husband member of society — Power of sale of co-operative society in the event of chargee's default — Defence that chargee not liable until dispute has been determined by competent court under s 49 of Co-operative Societies Act 1948 — National Land Code 1965, s 254 — Co-operative Societies Act 1948, s 49

Banking — Security — Loan granted by co-operative society to a member — Wife of member charging land as security for loan — Default in payment of loan — Liability under the charge — Co-operative Societies Act 1948, s 49 — National Land Code 1965, s 254

Words and Phrases — 'Dispute' — Co-operative Societies Act 1948, s 49

In this case, the appellant, a co-operative society, had granted a loan of $100,000 to a member of the society. In order to secure the loan, the respondent, the wife of the member, charged a piece of land of which she was the registered proprietor in favour of the appellant. Under the charge, the respondent agreed to pay the appellant on demand the total amount outstanding on the said loan together with interest. The respondent defaulted in the repayment of the loan and the appellant took steps to have the land sold by public auction to recover the loan. At the trial, counsel for the respondent submitted that the respondent was not liable until the breach by the member of the co-operative society had been determined by a competent court. Reference was made to s 49 of the Co-operative Societies Act 1948. The learned trial judge dismissed the application of the appellant and the appellant appealed.

Held, allowing the appeal:

(1) Section 49 of the Co-operative Societies Act 1948 has no application in this case as the respondent is not a member of the co-operative society and the transaction between the appellant and the respondent does not create a dispute which only involved the society and a member.

(2) The matter of the charge is one under the National Land Code 1965. It creates a right on the part of the chargee in the event of default to pay to exercise the power of sale. The court has the power to make the order for sale.

(3) This is not a dispute between the appellant and any of its members. The fact that the appellant is a co-operative society does not automatically make the litigation a dispute within the meaning of s 49 of the Co-operative Societies Act 1948.

[Didalam kes ini, pihak perayu, sebuah pertubuhan koperasi, telah memberikan pinjaman sebanyak $100,000 kepada seorang ahlinya. Untuk menjamin pinjaman itu, pihak responden, isteri ahli itu, telah mencagar sebidang tanah kepunyaannya kepada pihak perayu. Mengikut cagaran itu, pihak responden bersetuju membayar kepada pihak perayu segala jumlah yang masih terhutang bersama bunga bila perayu membuat tuntutan. Responden telah ingkar membayar balik pinjaman itu dan perayu telah mengambil tindakan supaya tanah itu dijual melalui lelong awam untuk mendapat kembali wang pinjaman itu. Di perbicaraan, peguambela pihak responden telah menghujah bahawa responden tidak bertanggungjawab sehingga perkara keingkaran ahli itu telah diputuskan oleh mahkamah. Peguambela telah merujuk kepada s 49 Akta Pertubuhan Koperatif 1948. Hakim yang arif telah menolak permohonan perayu dan beliau telah membuat rayuan.

Diputuskan, membenarkan rayuan pihak perayu:

(1) Seksyen 49 Akta Pertubuhan Koperatif 1948 tidak berkenaan dengan kes ini kerana responden bukan seorang ahli pertubuhan koperatif itu dan urusan antara perayu dan responden itu tidak membangkitkan perselisihan yang cuma melibatkan sebuah pertubuhan dan seorang ahli.

(2) Perkara cagaran itu terlibat di bawah Kanun Tanah Negara 1965. Ia membentuk hak pemegang cagaran menggunakan kuasa penjualan jika berlakunya keingkaran. Mahkamah mempunyai kuasa membuat perintah penjualan.

(3) Ini bukan satu perselisihan antara perayu dan seseorang ahlinya. Fakta bahawa perayu ialah sebuah pertubuhan koperatif tidak secara automatik membawa dakwaan itu sebagai satu perselisihan di bawah makna s 49 Akta Pertubuhan Koperatif 1948.]

Cases referred to

1 *Bede Steam Shipping Co Ltd* v *Bunge Y Born* (1927) 27 Lloyd's Rep 410 (refd)
2 *Professor Dr A Kahar Bador & Ors* v *N Krishnan & Ors* (No 2) [1983] 1 MLJ 412 (refd)
3 *Subramaniam* v *Tan Lee Leng & Ors* [1980] 1 MLJ 171 (refd)
4 *M Arulandan* v *Malaysian Co-operative Insurance Society Ltd* [1987] 1 MLJ 485 (refd)
5 *Deccan Merchants Co-operative Bank Ltd* v *Dalichand Jugray Jain & Ors* AIR 1969 SC 1320 (refd)

Legislation referred to

Co-operative Societies Act 1948 s 49
National Land Code 1965 ss 254, 256, 257

CV Das (*John Mathew* with him) for the appellants.
PM Mahalingam for the respondent.

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): We allowed the appeal and stated we would give our reasons. We do so now. The respondent (chargor) is the registered owner of a piece of land. She is the wife of Krishnadas Nair who is a member of a co-operative society registered under the Co-operative Societies Act 1948.

The appellant (chargee) granted a loan of $100,000 on 23 March 1984 to Krishnadas Nair for a term of two years from the date of first drawdown at the interest rate of 14.5% pa on monthly rests and the said interest rate was to be increased to 15% pa on monthly rests from 1 September 1984. In order to secure the said loan, the respondent, on 13 October 1983, executed a first legal charge over the said land in favour of the appellant which charge was registered. By the term of the said charge, the respondent agreed to pay to the appellant on demand the total amount outstanding together with interest and further default interest at the rate of 20% pa on the amount in excess of the limit from the due date to final settlement. The respondent defaulted in the repayment of the loan together with interest. A notice in Form 16D under s 254 of the National Land Code 1965 was sent to the respondent who acknowledged receipt.

It is not in dispute that the loan was taken by the respondent's husband for a housing scheme which had encountered some difficulties. It is also not in dispute that O 83 r 3 of the Rules of the High Court 1980 had been complied with. By originating summons dated 13 March 1986, the appellant sought, inter alia, for an order of sale of the said land by public auction.

Before the learned judge, counsel for the respondent submitted that the respondent was not liable until the breach by the member of the co-operative society had been determined by a competent court. Under s 49(2) of the Co-operative Societies Act 1948, where a dispute has been referred to the Registrar-General he may (a) decide the dispute himself; (b) refer it for disposal to an arbitrator or arbitrators; or (c) require the parties concerned to refer the dispute to a court. The appellant has appealed to the Registrar-General who opted for s 49(2)(c) and advised the parties concerned to take the matter to court. The contention of the respondent is that until the breach by the member has been established, any action against the respondent is premature.

NH Chan J in a short judgment stated that:

> The chargor is in danger of losing his security by an order of sale if the borrower is liable to pay the chargee for the loan. In the present case, the Registrar of Co-operative Societies has referred under s 49(2)(c) the dispute between the member borrower and the co-operative society to the court. Until that is resolved, the borrower is not liable to pay. And if the borrower is not liable to pay, the applicant chargor is similarly not liable.

The appellant appealed. The respondent is not a member of any co-operative society. Her husband is such a member. The respondent charged her land as security for the loan given to her husband. The charge is in the usual form. When a charge is executed, an independent obligation is created and is statutorily enforceable. The remedies of the appellant are covered by cl 9 of the charge in the event of default. Proper statutory notice in Form 16D under s 254 of the National Land Code 1965 was given to the respondent. In so far as the charge is concerned, there is no dispute. Further, the respondent conceded that the money was due and payable. A mere refusal to pay or failure to pay money which is admittedly due does not create a dispute.

The matter of the charge is one under the National Land Code 1965. We see no reason to resort to s 49 of the Co-operative Societies Act 1948 which can in no way affect an independent obligation of a non-member under a charge. The fact that there is a dispute between the co-operative society and a member borrower within the meaning of s 49(2)(c) of the Co-operative Societies Act 1948 should not affect an action based on an independent obligation in respect of a non-member. The respondent cannot take shelter under s 49 which does not apply to her in her capacity as a chargor. The only defence of the respondent is that until the dispute between the member borrower and the co-operative society is settled the action against the respondent is premature. It was clearly wrong for the learned judge to dismiss the application. If he considered that the dispute between the co-operative society and the member borrower should be resorted to first, then, the proper order to make is an order of stay.

Reference may be made to paras 4, 5, 6 and 7 of her affidavit in reply:

> 4 Sometime on 19 March 1984, I entered into a loan agreement with the applicant's bank (hereinafter referred to as 'the said bank') as a chargor for a loan of $100,000 to be granted to Mr A Krishnadass, the borrower, who is my husband.
>
> 5 The sum of $100,000 was released direct to Bernam Cahaya Sdn Bhd, sometime on the same month by the said bank.
>
> 6 The said Bernam Cahaya Sdn Bhd had used the said sum together with other sum or sums to finance part of the purchase price on land held under SLG 31085, lot no 1210, mukim of Pulau Sebang, Alor Gajah, Melaka consisting of an area of 29 acres 0 roods 10 poles valued at $1.75m (hereinafter referred to as the said land) by Jordan Lee and Jaafar, the panel valuers. (See exh marked 'A'.)
>
> 7 At the time of purchase of the said land, it was the intention of Bernam Cahaya Sdn Bhd to develop the said land into a housing project, which would give a profit of $4m approximately for 371 units. If this scheme had gone through, the said bank would have been paid in full even before the said bank's demand notice.

It will be noted that what she has executed is not a loan agreement but a charge. She admitted the money was

given and was used to purchase certain land for a housing project. In paras 13 and 14 of her affidavit, she blamed the government of Malacca for the difficulties encountered by Bernam Cahaya Sdn Bhd. One thing is clear, that is, the debt is never denied.

As for s 49 of the Co-operative Societies Act 1948, the appellant contended that it affects members of a co-operative society but not outsiders. Also, the mere fact that the said section deems it to be a dispute does not affect an independent obligation. A dispute in the statutory sense does not mean a denial of liability to pay. At common law the inability to pay is not regarded as a dispute. See *Bede Steam Shipping Co Ltd* v *Bunge Y Born*[1] at p 413. Section 49 of the Co-operative Societies Act 1948 has been referred to in *Professor Dr A Kahar Bador & Ors* v *N Krishnan & Ors (No 2)*;[2] *Subramaniam* v *Tan Lee Leng & Ors*;[3] and *M Arulandan* v *Malaysian Co-operative Insurance Society Ltd*.[4] These three cases dealt with members of the co-operative societies.

Counsel for the respondent conceded that the respondent's husband owed the appellant money. Both the respondent and her husband were merely asking for time. The respondent's husband could not obtain the loan without bringing in the respondent. It is her submission that the appellant has to overcome a hurdle in the nature of s 49 of the Co-operative Societies Act 1948. The dispute has been referred to the court. Until the dispute has been adjudicated by the court, the borrower member is not liable to pay. Similarly, the respondent is not liable to pay. Counsel for the respondent said the learned judge took the right approach.

Counsel for the appellant urged the court to follow the interpretation of the Indian court on s 49 as our co-operative societies legislation was based on the Indian legislation which was taken from the English Friendly Societies Act 1922. The action against the respondent is in respect of a charge which has created an independent obligation. The right of redemption and the right of foreclosure are rights which only the courts can give. Moreover, in this case the respondent (chargor) is not a member of the society concerned.

In *Deccan Merchants Co-operative Bank Ltd* v *Dalichand Jugray Jain & Ors*,[5] the court in construing 'dispute' under s 54 of the Bombay Co-operative Societies Act 1925 (the equivalent of our s 49) stated at p 1326:

> One other limitation on the word 'dispute' may also be placed and that is that the word 'dispute' covers only those disputes which are capable of being resolved by the Registrar or his nominee. It seems to us very doubtful that the word 'dispute' would include a dispute between a landlord society and a tenant when the landlord society has not been set up for the purpose of constructing or buying and letting out houses....
>
> This was the line of reasoning adopted by the House of Lords in *EC Mulkern* v *James Lord* (1879) 4 App Cas 182 in holding that 'proceedings in respect of accounts under a mortgage and sale of the property, which might include title to redemption or a judgment of foreclosure, were not such disputes between the society and a member as the statutes (Friendly Societies Act (10 Geo 4, s 56) read with s 4 of 6 and 7 Will, 4, c 32) had contemplated'.
>
> Now, before a case can fall under s 54 [of the Bombay Co-operative Societies Act VII of 1925], it is not sufficient that there should be a dispute touching the business of the society. What is further required is that the dispute must be between the society and its member, and proper emphasis has got to be laid upon the expression 'member' used in this section. The dispute must be between the society and the member as a member or quae a member. It must be a dispute in which the member must be interested as a member. It must relate to a transaction in which the member must be interested as a member.

In our case, it is clear that the charge has created an independent obligation. Moreover, the respondent (chargor) is not a member of any co-operative society. Consequently, the provisions, particularly s 49 of the Co-operative Societies Act 1948, do not apply to her. The fact that the dispute between the co-operative society and the member borrower has not been resolved is not good ground for saying that the respondent is not liable. Neither is it good ground for refusing to enforce the charge by the appellant. There is nothing to support the preposition that a chargor who is not a member of any co-operative society cannot be made liable until the dispute between the co-operative society and the member borrower has been resolved. It is against business efficacy. The respondent cannot resort to s 49 which does not apply to her in any case to prevent the enforcement of a claim under a charge which is not in dispute.

This is an ordinary claim arising out of a charge. The claim would have been concluded as a matter of course but for the contention of the respondent that by virtue of s 49 she is not liable until the dispute between the co-operative and the member borrower has been resolved.

In our view, s 49 has no application in the instant case. First, the respondent is not a member of the co-operative society. Secondly, the transaction between the appellant and the respondent does not create a dispute which only involves a society and a member. Thirdly, the charge creates a right on the part of the chargee in the event of default to pay to exercise the power of sale. Fourthly, only the courts have the powers to make the order for sale. Fifthly, it is against business efficacy. No financial institution would like to deal with either a co-operative society or its members if s 49 is invoked everytime there is a litigation. Moreover, it is not a dispute between a society and any of its members. The fact that the appellant is a society does not automatically make the litigation a dispute within the meaning of s 49.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Mahadevi Ganeshmurugam & Co.*

Reported by *Prof Ahmad Ibrahim*